SUPREME COURT, U. S.

FILE

SEP 26

MICHAEL RODAK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

REPLY BRIEF

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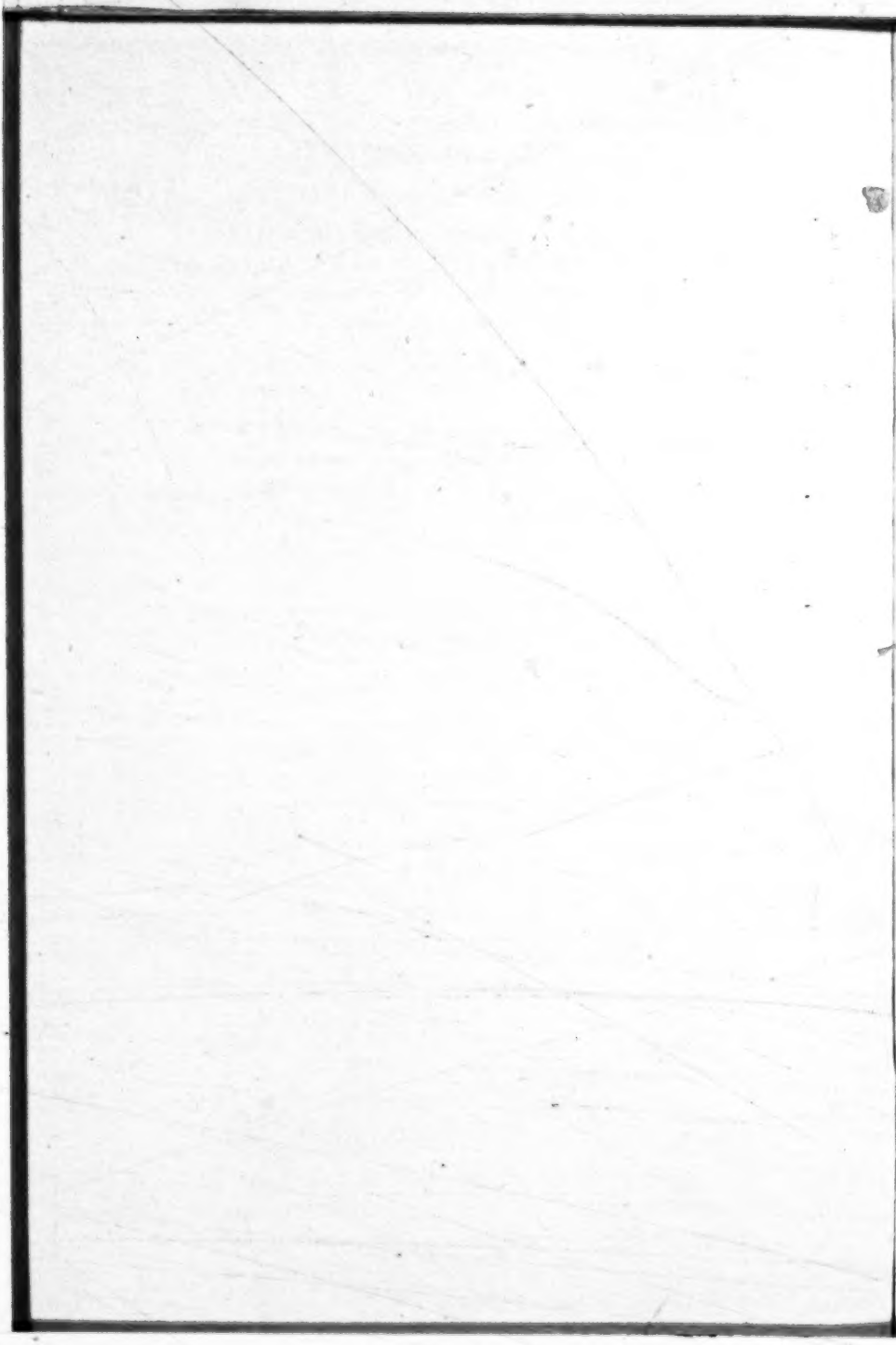

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REPLY BRIEF

I.

THE STATE HAS NO SUCH COMPELLING INTEREST IN FILING FEES AS TO JUSTIFY INTERFERING WITH RIGHTS GUARANTEED BY THE CONSTITUTION TO PETITIONER AND MEMBERS OF HIS CLASS.

A. The United States Constitution guarantees the right to be a candidate for public office.

Petitioner in his brief has set forth the legal arguments for the proposition that the right to be a candidate is protected by the Constitution. We do not wish to burden this Court unduly by repeating the arguments therein. However, we would re-emphasize this Court's own position at page 142 of *Bullock v. Carter,* 405 U.S. 134 (1972):

"The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. . . ."

Although Mr. Justice Harlan and Mr. Justice Brennan disagree in many respects in their opinions in *Oregon v. Mitchell,* 400 U.S. 112 (1970), they both agreed that the right to vote implies the right to be voted for.

In Footnote 19, at page 167, Mr. Justice Harlan said:

". . . I would find it surprising if a State could undercut the right to vote by taking steps to ensure that all candidates are unpalatable to voters of a certain race. Although an explicit provision on officeholding was deleted from the proposed Fifteenth Amendment at the eleventh hour, the idea that the right to vote without more implies the right to be voted for was specifically referred to by supporters of the Fifteenth Amendment in both Houses of Congress. See Cong. Globe, 40th Cong., 3d Sess., 1425-1426 (1869) (Cong. Boutwell); id., at 1426 (Cong. Butler); id., at 1629 (Sen. Sawyer)."

In that same case which dealt so admirably and at such length with political processes under the United States Constitution, Mr. Justice Brennan, disagreeing with Mr. Justice Harlan, at page 252, said:

". . . [O]ur Brother Harlan's view would appear to leave the States free to encourage citizens to case [sic] their votes solely on the basis of race (a practice found to violate the Fourteenth Amendment in *Anderson v. Martin, supra*), or even

presumably to deny Negro citizens the right to run for office at all. We cannot believe that the Equal Protection Clause would permit such discrimination."

B. There is no compelling state interest in limiting the number of names on the ballot by means of a filing fee requirement which is neither reasonable nor necessary to accomplish that end.

Respondent argues that there is a compelling state interest in limiting the number of names printed on the ballot which can only be met by a filing fee requirement. He alleges that the filing fees in California are reasonable. We respectfully disagree with all such assertions.

Petitioner agrees that the state has a legitimate interest in regulating the number of candidates on a ballot. However, respondent does not articulate any reasons which factually establish a *compelling* interest in using this particular means, i.e., onerous filing fees. Since restrictions are imposed on an explicitly-protected constitutional right, the means used must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment. *Bullock v. Carter, supra,* at page 141. Filing fees, particularly of the range included in the California filing fee schedules at issue here, are not a legitimate means of meeting the asserted problems because they discriminate against petitioner and members of his class who are poor. The fee of $701.60 is no more reasonable for poor people than the $1,000 filing fee complained of by candidate Carter in *Bullock v. Carter, supra.*

II.

A FILING FEE IS NOT A REASONABLE MEANS OF LIMITING THE BALLOT TO SERIOUS CANDIDATES.

A. The individual's ability to pay a filing fee does not determine the seriousness of his or her candidacy.

Respondent's major arguments are directed to the matter of limiting the ballot, to insure that only "serious" candidates are placed thereon.

This Court in *Bullock v. Carter, supra,* at pages 145, 146 specifically dealt with respondent's contention:

> "... To say that the filing fee requirement tends to limit the ballot to the more serious candidates is not enough. There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, but the candidates in this case affirmatively alleged that they were *unable,* not simply *unwilling,* to pay the assessed fees and there was no contrary evidence. It is uncontested that the filing fees exclude legitimate as well as frivolous candidates. And even assuming that every person paying the large fees required by Texas law takes his own candidacy seriously, that does not make him a 'serious candidate' in the popular sense. If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; other means to protect those valid interests are available."

As Judge Wollenberg so aptly stated in *Wong v. Mihaly,* 332 F. Supp. 165 (1971), at page 168:

> "The proposition that every serious candidate will be able to pay the fee required cannot be accepted without question.... There is, in fact, much to

suggest that money and seriousness of candidacy are not always to be found in the same office seeker. On the other hand, it is clear beyond question here that the man who cannot pay, no matter how serious he is, cannot place his name in nomination."

B. The seriousness of a candidate cannot be judged by the person's ability to win.

Respondent argues at page 4 of his brief:

"... There is no room on the ballot for one who, although actually desirious [sic] of the office for which he files knows that he does not have even a remote chance for nomination or election. No matter how desirous of the office he may be if he knows he has no chance to be either nominated or elected his candidacy is not in good faith."

Respondent, having added a new qualification for holding political office to those set forth in the statutes and State and Federal Constitutions, also neglects to indicate how the payment of a fee relates to a determination that one "knows" he has a chance to be nominated or elected. If such a qualification is added with retroactive effect, a number of officeholders today who won seats in either the California State Legislature or Congress against overwhelming odds would have to resign from their positions since their candidacies were obviously not in good faith.

Whether a person will be nominated or elected is a question to be decided by the voters.

Respondent's theory that the only serious candidate is one who can win is challenged in *Harper v. Vance*, 342 F.Supp. 136, 143 (Ala. 1972). The Court there recognized that a candidate need not intend to win to be serious.

Furthermore, the mere fact that a person is able to afford the filing fee does not mean that he necessarily has substantial support or any chance to be nominated or elected. An excellent example is the Republican Party primary election contest for Governor of California in June 1966–a contest with five candidates and no incumbent. According to his required Statement of Receipts and Expenditures on file in the Secretary of State's office in Sacramento, candidate William Penn Patrick spent approximately $332,000 (including $327,401 of his own funds) on this race, yet received only 1.87% of his Party's vote according to *California Statement of Vote, Consolidated Primary Election, June 7, 1966*, page 6, compiled by Secretary of State Frank M. Jordan. Present California law would allow Mr. Patrick to have his name printed on the ballot because he could afford to pay the filing fee, while it would deny this same right to those otherwise qualified indigent candidates who eventually had their names printed on the 1972 ballot by virtue of the temporary injunction in *Chote v. Brown*, 342 F. Supp. 1353 (N.D. Cal. 1972), sustained by this Court in *Brown v. Chote*, ___ U.S. ___, 41 L.W. 4548 (1973) (No. 71-1583, October Term 1972). Every indigent candidate received a higher percentage of the vote than did Mr. Patrick.

Candidate H. Steve Luce, who ran for Congress in the Democratic primary election in 1972, was one of the poor candidates permitted to file without payment of the fees by the temporary injunction issued in *Chote v. Brown, supra.* According to his required public Statement of Receipts and Expenditures filed with the Los Angeles County Registrar-Recorder, he spent $178 (including $138 of his own funds), considerably under the filing fee of $425, and received 34% of the total votes cast in the Democratic primary, over 17,000 votes.

Thus, respondent's statement:

> "Since the Requirement of a Filing Fee serves a Compelling State Interest, insofar as it may bar a Frivolous Candidate from the Ballot it does not Discriminate against the Poor." (Brief of respondent, page 14)

is not borne out by the facts of elections in California. A large filing fee would bar the candidacy of H. Steve Luce, but does nothing to prevent the running of a William Penn Patrick. And more importantly, who is to make the decision that less than 2% of the vote represents an insignificant or frivolous candidacy?

Petitioner has been unable to find any authority for the proposition that candidates are not entitled to be placed on the ballot when they meet the qualifications set forth in the pertinent statutes and the State and Federal Constitutions. There are no mystical provisions that they must intend to win at this election.

An excellent example of a non-serious, and perhaps even fraudulent, candidate who was allowed to have his name printed on the ballot because a filing fee was paid on his behalf occurred in the May 1, 1973 special election to fill the vacancy in California's 38th Assembly District. In order to confuse voters supporting candidate Frank Vicencia, one of the other candidates convinced a person by the last name of Valencia to enter the race. Valencia asked that his name be listed as "E. 'Frank' Valencia" and that his occupation be listed as "legislative advisor" (as compared to Vicencia's occupational listing of "legislative consultant"). The Secretary of State refused to allow Valencia to use "E. 'Frank' " on the ballot since his nickname was not "Frank", and refused to allow Valencia to use the occupation of "legislative advisor",

since he was actually employed as a draftsman. Valencia never produced any campaign literature, mailed out any press releases, or appeared at any of the candidate forums. None the less, since a $192 fee had been paid on his behalf, county and state officials had to allow his name to be printed on the ballot as "E. Valencia" without any occupational listing.

C. Reasonable signature requirements as a test of seriousness or good faith are a realistic alternative to filing fees.

Filing fees are not a practical test of the good faith of a candidate. Respondent shows a total lack of imagination and research when he states there is no other practical test (Brief of respondent, page 19). Respondent apparently assumes that this Court is unaware that New York State, which is surely comparable in size and complexity to California, has no filing fee requirement.[1] And in this, she is not alone. At least 21 other states have no filing fee requirements. (See petitioner's opening brief, page 19.)

None of these states seem to have had the problems indicated in New Mexico (Brief of respondent, page 4). Perhaps, this is because New Mexico has no signature requirement whatsoever. The good faith of a candidate can in fact be tested by adequate signature requirements. These test the candidate's willingness to go out and do the work required in obtaining signatures. Importantly, they also determine whether there are a specified number of persons willing to sign their names to a nominating petition to place the candidate on the ballot.

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[1] See *The Consolidated Laws of New York, Election Law.*

D. The ability to raise "modest contributions" is not a valid test of the seriousness of a candidate.

Respondent further argues that all "serious" candidates, regardless of their poverty, will be able to find modest contributions to meet the "reasonable" California fees. First, the fee of $701.60 involved here is not unusual in the California filing fee scheme which includes some higher. To poor and middle-class people alike, such a fee is neither modest nor reasonable. It is in fact very close to those complained of by candidates Carter and Pate in *Bullock v. Carter, supra.*

Second, and most important, modest contributions realistically are not available to many candidates, and most poverty candidates. For instance, in the aforementioned H. Steven Luce election campaign, the poor candidate was able to get 17,000 votes (34% of the total), although he was able to raise only $178 in contributions, including his own of $138.

The reality of "modest contributions" was dramatically indicated by the American citizens' response to the Congressional plan to permit taxpayers to divert a portion of their income taxes to the party of their choice for presidential elections. Despite the fact that there was no cost to the taxpayer and no burden other than to fill out a very simple form and include it with his tax return, there was negligible response. According to a U.P.I. dispatch from Sacramento as printed in the *Valley News & Green Sheet* on July 26, 1973, "Robert Borger of the Sacramento I.R.S. office said nationally about 3% of the taxpayers made such a contribution but in California only about 2.3%, or about 180,000 returns, did so." If only 3% of those who make enough money to file a tax return were willing to make this small effort, it is the height of absurdity to say that a poor person could easily

obtain contributions. The fact remains that campaigns are funded by contributions primarily from rich persons and corporations, legally and illegally (see the Cox investigations) and that such sources are not readily available to poor persons who may challenge the current approach to this country's major problems of war, high taxes, inadequate medical care, environmental waste, poor housing and the like.

III.

POOR PEOPLE CANNOT BE REQUIRED TO MEET MORE STRINGENT TESTS THAN THOSE REQUIRED OF THE AVERAGE POLITICIANS IN ORDER TO PARTICIPATE IN THE ELECTORAL PROCESS.

A. People cannot be discriminated against solely because of their poverty.

This Court has repeatedly said persons cannot be discriminated against because of poverty. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Boddie v. Connecticut*, 401 U.S. 388 (1971); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

Respondent makes much of the fact that *Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241 (1971), was impliedly overruled by *San Antonio Independent School District v. Rodriquez*, 410 U.S. ___, 36 L.Ed.2d 16 (1973), since it was mentioned eight times in footnotes. He uses this to show that petitioner's cases are not persuasive. Yet, petitioner cited the *Serrano v. Priest* case for the proposition that classification based upon wealth is a violation of the Equal Protection Clause. The *San Antonio* case did not reverse this proposition. The majority opinion at 36 L.Ed.2d 16, at page 35, held:

"The precedents of this Court provide the proper starting point. The individuals or groups of individuals who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."

The opinion then analyzed the cases from *Griffin v. Illinois, supra,* to *Bullock v. Carter, supra.* At page 36, the opinion continues:

"Finally, in *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972), the Court invalidated the Texas filing fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars and, in at least one case, as high as $8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided 'no reasonable alternative means of access to the ballot' [Id., at 149, 31 L.Ed.2d 92], inability to pay occasioned an absolute denial of a position on the primary ballot."

B. Wealth cannot be a required qualification for political office.

Respondent at page 21 of his brief says:

"... Obviously no one has a constitutional right to have his vote counted for a candidate who is ineligible for the office he seeks. By analogy, no one has a constitutional right to have his vote counted for one who fails to qualify as a candidate."

And thereby, respondent has added wealth as a qualification for political office. Obviously, failure to qualify in that context can only mean failure to pay the fee.

Respondent's attitude toward poor persons desiring to become candidates is evident. At page 9 of his brief, he suggests that a poor person in politics must have "in addition to the qualifications required by law, a high degree of integrity, ability, diplomacy, and tact." This is a nice sentiment, and one to be heartily encouraged in view of the spate of indictments and convictions of local, state and federal government officials in the past several years. But the question must be asked, why these qualities are only to be required of the poor and their champions?

C. Participation in the political process is explicitly guaranteed in the United States Constitution.

Respondent appears to argue that the filing fees to be charged for the right to participate as a candidate in the political process are on a par with drivers' licenses and business licenses. However important the rights to these licenses may be, neither are rights explicitly guaranteed by the Constitution.

San Antonio Independent School District v. Rodriquez, supra, held that the importance of a service performed by a state does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause of the Fourteenth Amendment. The determination depends upon explicit guarantees in the Constitution. Thus, the majority opinion was that education, while important, was not explicitly guaranteed by the Constitution and therefore was not within the purview of the Equal

Protection Clause. The Court specifically contrasted political rights which they held were fundamental and explicitly guaranteed.

Under the rationale of *San Antonio Independent School District v. Rodriguez, supra,* the state may in fact have legitimate reasons to tax or control the granting of drivers' licenses and business licenses. However, it is clear, that the *San Antonio* case supports petitioner's basic premises that the rights involved in the political process are of an entirely different magnitude. The state cannot discriminate in these processes just because it has reasonable objectives. Thus, cases dealing with the right to a driver's license or a business license would be at most peripherally related to the constitutionally-protected right to participate in the electoral process.

IV.

THE STATE AND COUNTY BEAR THE COSTS OF BOTH PRIMARY AND GENERAL ELECTIONS IN CALIFORNIA.

Respondent asserts that neither the state nor the county should pay campaign expenses. But they do! The State of California and each county, including Los Angeles, pay the costs of elections, both primary and general. The brief for the Appellant, California Secretary of State, in the case of *Brown v. Chote, supra,* at page 11 states:

> "Nor does California place the burden of financing primary elections on the candidates. Under the California system, the candidate fees reimburse state and local government for only a reasonable portion of the total election cost.[1]"

The footnote read:

"[1] The Secretary of State is budgeted for over one million dollars for election expense of that office in 1972. The total fees forwarded to that office from candidates for Representative in Congress, State Senator, or Assemblyman in connection with the 1972 primary was $171,577.

"The counties print the sample and final ballots, pay the election officers, purchase voting equipment. [Elec. Code §10,000.] Thus, general tax funds provide the primary source of funds to defray election cost at both the state and local level."

Obviously, if the election-cost figures of the Secretary of State are correct (and, as indicated below, there are some reasons to suspect they may be higher), the moneys collected from filing fees are about 10% of the total cost of the elections. The fees are not large enough to pay the cost of conducting the elections, and they are obviously totally unrelated to the cost of filing the forms only. The state is subsidizing primary elections for those who are rich enough to meet the high fee schedule set by the state to keep the poor out of the electoral process.

The costs of elections may in fact be much higher than the amount budgeted in 1972.

According to a story in the *Los Angeles Times* on September 3, 1973, on page 2 of Part I:

"A $19.1 million price tag has been attached to the special election slated for Nov. 6 to decide Gov. Reagan's controversial tax limitation plan. Secretary of State Edmund G. Brown, Jr. said cost estimates from county election officials show they expect to spend $14,192,540 for the election and related costs while the state expects to spend close to $5 million and the cities about $200,000. Earlier cost estimates for the election were lower because they had not

included city and county expenses, Brown said. The Reagan plan would impose a gradually descending lid on the percentage of income the government could take in taxes. It would cut the present 8.75% to slightly more than 7% over the next 15 years."

It follows that although all of the citizens pay the costs of elections indirectly, certain people are not permitted to be subsidized as candidates in either the primary or general elections because they cannot pay the initial filing fee. It then becomes clear that the only justification for the state and county imposition of filing fees is limiting the size of the ballot. And as this Court so aptly noted in *Bullock*, at page 145:

"... To say that the filing fee requirement tends to limit the ballot to the more serious candidates is not enough."

Even the federal government is for the first time subsidizing the cost of future elections through the use of General Revenue Sharing Funds for capital expenditures by local governments for vote recording and vote tabulating devices. (See the affidavit of Lewis B. McCammon, III, attached as Exhibit "A".) Thus, federal moneys intended to benefit the poor as a specified top priority are now being funneled off to support a process from which those very poor people are excluded in a state like California.

Since the state and local governments in fact bear the majority of costs of the election, any filing fee should relate solely to the cost of filing the forms themselves, an amount perhaps as little as $1.00 or as much as $10.00. As this Court observed in Footnote 29 at page 148 in *Bullock v. Carter, supra*:

"This would be a different case if the fees approximated the cost of processing a candidate's

application for a place on the ballot, a cost resulting from the candidate's decision to enter a primary. The term 'filing' fee has long been thought to cover the cost of filing, that is, the cost of placing a particular document on the public record."

This Court then recognized in that same case, at page 148:

"... More importantly, the costs do not arise because candidates decide to enter a primary or because the parties decide to conduct one, but because the State has, as a matter of legislative choice, directed that the party primaries be held. The State has presumably chosen this course more to benefit the voters than the candidates.

"Appellants seem to place reliance on the self-evident fact that if the State must assume the cost, the voters, as taxpayers, will ultimately be burdened with the expense of the primaries. But it is far too late to make out a case that the party primary is such a lesser part of the democratic process that its cost must be shifted away from the taxpayers generally. The financial burden for general elections is carried by all taxpayers and appellants have not demonstrated a valid basis for distinguishing between these two legitimate costs of the democratic process. It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth. Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. Without making light of the State's interest in husbanding its revenues, we

fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters."

V.

THE CALIFORNIA FILING FEE SYSTEM IS NOT REASONABLE.

A. Filing fees set by statute are not necessarily reasonable.

Respondent argues that the filing fees of California are reasonable. He argues that the difference between Texas and California is that California filing fees are set by statute, not by political parties. But Texas had a mixed system with some fees set by statute and others by party committees. The fact that the legislature sets fees does not make them reasonable. There is nothing sacred about legislative action. State and federal courts are always passing on the constitutionality of legislative action. Moreover, the fees declared unconstitutional in *Harper v. Vance, supra,* were set by the Alabama statutes.

The real issue is not who sets the fees, but whether they are necessary as well as reasonable. Even a reasonable fee is invalid if it prevents persons from exercising constitutionally-guaranteed rights.

Respondent repeatedly claims that the California fees are "reasonable". He uses the 2% figure as though it were magical. But the reality is that 2% of the Los Angeles County Board of Supervisor's salary which is at issue in the present case is $701.60, a figure close to the $1,000 complained of in *Bullock, supra.* Furthermore, a bill is pending to raise the salary of the Governor in the State of California to $60,000. If it passes, which seems likely, the fee for that office will then be $1,200.

B. Filing fees which are a percentage of emoluments of an office, unrelated to the costs of the elections or filings of documents connected therewith are not reasonable.

Two percent of a salary has no relationship to the cost of conducting an election around that position or any positions. It is based purely on the emoluments of the office. Surely, an election which includes offices such as State Board of Equalization for which a filing fee is charged of $250 (1% of annual salary)[2] and which covers one quarter of the state's population (over 2,000,000 voters), costs more to conduct than an election for Board of Supervisors for which a filing fee of $701.60 is charged and which covers approximately 600,000 voters. Ballots will cost the same, regardless of the emoluments of the offices included thereon. Moreover, the candidates for the State Board of Equalization must file Statements of Receipts and Expenditures with both the County and the State while the candidate for Board of Supervisors need only file with the County.[3] Members of both the State Board of Equalization and the Los Angeles County Board of Supervisors serve four-year terms and both have their filing fees set by the State Elections Code.

This non-relationship between filing fees based on a percentage of salary and the cost of conducting elections is further illustrated in the City of Los Angeles. In January 1973, the filing fee to run for City Council was $340 (2% of annual salary, set by City Charter).

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[2] *California Elections Code* §6552(b) and *Government Code* §11556.

[3] *California Elections Code* §11564.

Immediately following the elections, the City Council members voted themselves a 76% increase in salary to $30,000 a year. The filing fee for that office is now $600, 76% higher than it was a few months ago. Yet, the costs of conducting city elections have in no way increased by 76%.

Filing fees based on a percentage of emoluments of an office have no relationship to the seriousness of a candidate for that office. Obviously, a candidate who wishes to run for Congress may be as serious as one who wishes to run for Board of Supervisors of Los Angeles County. Yet the fee for the former is only $425 (1% of annual salary) as opposed to $701.60 (2% of annual salary) for the latter.[4]

VI.

PETITIONER AND MEMBERS OF HIS CLASS ARE ENTITLED TO A PLACE ON THE BALLOT IF THEY QUALIFY IN ALL OTHER RESPECTS BUT ARE UNABLE TO PAY THE FILING FEES.

A. Petitioner has a right to have his name on the ballot.

Respondent attempts to avoid the obvious conclusion and application of *Bullock v. Carter, supra,* to California's filing fee system by harping upon the concept of write-in campaigns. Petitioner is not before this Court demanding that his write-in votes be counted. He has the right to have his name *printed* on the ballot, to place his candidacy before the California electorate in a meaningful way, and not to be excluded from effective political participation, solely because of his lack of wealth. *Bullock v. Carter, supra,* at page 149 stated:

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[4] *Elections Code* §§6552, 6554.

"... by providing no reasonable alternative means of access *to the ballot*, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot." (emphasis added)

Respondent argues that there is no legal right to be on the ballot and cites *Roberts v. Cleveland*, 48 N.M. 226, 149 P.2d 120 (1944), and *State Ex Rel. O'Sullivan v. Swanson*, 127 Neb. 806, 257 N.W. 255 (1934). Both cases dealt with the issue of whether a candidate *defeated* in a primary election could then demand a right to be on the general election ballot. This is not even remotely related to the issue of whether a candidate can be kept from the ballot solely because of his lack of wealth and inability to pay a filing fee. There is no analogy possible. There is no constitutional protection for a class composed of persons who have lost an election because they were rejected by the majority of voters who are members of their own political party.

The write-in candidacy is in no way comparable to a place on the ballot.

B. California's filing fee system requires payment of fees before write-in votes are counted.

Although respondent has argued that payment of filing fees are not necessary (Respondent's brief, pages 31, 32), his effort to slough off §18603(b) must surely fail. The statute is plain and means what it says. Although §6555 is not involved in this case, it suffers from the same infirmities as §§6552, 6554, etc.

C. Write-in campaigns are not a meaningful alternative to having one's name printed on the ballot.

Respondent continuously asserts that California's system is not as onerous as the Texas system. But Texas

permitted a candidate to run in the general election without payment of filing fees if the candidate were willing to drop his or her political affiliation. Only the party primaries required fees. Even this was not adequate. As this Court in *Bullock v. Carter, supra,* at page 146, said:

> "Instead of arguing for the reasonableness of the exclusion of some candidates, Appellants rely on the fact that the filing fee requirement is applicable only to party primaries, and point out that a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition. Apart from the fact that the primary election may be more crucial than the general election in certain parts of Texas, *we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law.* Appellants have not demonstrated that their present filing fee scheme is a necessary or reasonable tool for regulating the ballot." (emphasis added)

California will not permit participation in either general or primary elections under any circumstances without the payment of a filing fee. *California Elections Code,* §§6551, 6552, 6554, 6555, 18602 and 18603.

If it is not a reasonable alternative to allow the candidate a place on the ballot without party designation, then a write-in campaign would be even less meaningful.

As Judge Wollenberg said in *Wong v. Mihaly, supra*:

> "... The possibility of a write-in campaign cannot be regarded as a sufficient answer to the problem", page 168.

D. California Elections Code §6661(a) places more onerous requirements on write-in candidates.

Respondent would lead this Court to believe that California law places the same value on a write-in vote as it places on a vote cast for a person whose name is printed on the ballot in primary elections. Such is not the case. California Elections Code §6661 states:

> "No person whose name has been written in upon a ballot for an office at the direct primary may have his name placed upon the ballot as a candidate for that office for the ensuing general election unless one of the following statements is true:
>
> "(a) At that direct primary election he received for that office votes equal in number to 1 percent of all votes cast for the office at the last preceding general election at which the office was filled.
>
> "(b) He is an independent nominee pursuant to Chapter 3 (commencing at Section 6800) of this division.
>
> "(c) He has been designated by a party central committee to fill a vacancy on the ballot for the general election."

Subsections (b) and (c) apply only in the case of candidates for partisan office. Subsection (a) is required of all primary write-in candidates for non-partisan office, including such as petitioner Lubin.

Since candidates whose names are printed on the primary election ballot are not required to obtain any particular percentage of the vote, §6661(a) places an additional requirement on write-in candidates. Under this section, some partisan candidates who won their Party's nominations by write-in were kept off the general election ballot in 1968, as is detailed below.

Peace and Freedom Party write-in candidate Eric Murphy, who received 1,076 votes as the only candidate in his Party's primary in the 9th Senatorial District in June 1968, was not allowed to have his name printed on the general-election ballot as his Party's nominee. He would have been certified as the nominee with only a single vote had his name been printed on the primary ballot, but the minimum number of votes to qualify a candidate by write-in in that district was 2,445.

Even more revealing was the case of the June 1968 primary elections in California's 20th Assembly District, in which the minimum number of votes required to qualify a write-in candidate was 476. The only Peace and Freedom Party candidate, write-in candidate Joseph P. Edmiston, won his Party's primary with 329 votes (10.4% of the 3,147 registered Party Members eligible to vote in the district and about 33% of those who went to the polls). Solely because he was short of the 476 vote minimum required of a write-in candidate, Mr. Edmiston was denied a listing on the general-election ballot as his Party's nominee. Yet, Sivella M. Batey, who received only 101 votes as the sole candidate in the 20th Assembly District's uncontested American Independent Party primary, was certified as the AIP nominee for the general-election ballot, the 476 vote minimum did not primary-election ballot, the 476 vote minimum did not apply. For statistics in the above cases, see *California Statement of Vote, Consolidated Primary Election, June 4, 1968*, pages 3, 16, and *California Report of Registration [and] Number of Voting Precincts for June 4, 1968, Consolidated Primary Election*, page 23, both compiled by Secretary of State Frank M. Jordan.

Undoubtedly this requirement has likewise denied many non-partisan write-in candidates a place on the ballot.

Even if petitioner Lubin and other poor candidates were allowed to run as write-in candidates without prepayment of filing fees, which they are not under §18603(b), they would still be subject to this additional burden.

VII.

THERE ARE NO ALTERNATIVES TO PAYING THE FILING FEE TO OBTAIN A PLACE ON THE BALLOT IN CALIFORNIA.

Respondent's reliance (Brief pages 30, 31) on the California Supreme Court's order in *Steiner v. Mihaly*, No. SF 22965, California Supreme Court, (October 18, 1972), as an alternative to paying filing fees to get write-in ballots counted is misplaced. Respondent would have this Court believe that further such orders could be obtained from a California Court, notwithstanding the provisions of *Elections Code* Section 18603. This interim order was based on the pendency of *Brown v. Chote, supra*, and/or the instant case. The order itself provided for "reserving to this court jurisdiction to determine whether such filing fee prescribed by the aforesaid sections of the Elections Code is lawfully required." (Brief of respondent, page 31.) If this Court should rule that the California filing fees are reasonable, and more importantly, that no poor candidate may run for office without the prepayment of such fees, an order similar to that granted in *Steiner v. Mihaly, supra*, could not be obtained.

Throughout respondent's brief, there has been a noticeable attitude toward the participation in the political process by the disenfranchised. This expressed attitude is one which certain groups have felt from all parts of the establishment: the attitude that people who

do not have enough money to meet adequately the needs of their families will somehow be able to make modest campaign contributions, that they will be able to rise above their circumstances and make great sacrifices to participate in a political system that produces a Watergate, that produces politicians on all levels who use their offices, in corrupt ways; the attitude that requires that those who have had the least advantages under this system should be able to, nay, must rise above it to a higher level of integrity, honesty, diplomacy and tact than those who are the direct beneficiaries of this system. It is precisely this kind of attitude which is causing more and more of the young and old to feel that there is little hope of reforming this system. What this Court does in recognition of the importance of including the disenfranchised, the young, the poor, the Blacks, Chicanos, Indians, Asian-Americans, and women in the political process, will do much to determine whether this system is in fact viable.

VIII.

THE FILING FEE REQUIREMENT IMPAIRS THE RIGHT TO FREE SPEECH.

Respondent refers the Court to *Ellis v. Dixon*, 349 U.S. 458 (1955), and quotes at page 459:

> "Petitioner concedes that a State may withhold its facilities *altogether* from use by non-scholastic groups. . . . " (emphasis added)

The analogy is not apropos. We agree with the proposition that the state may withhold certain facilities as long as it withholds them altogether. *Ellis v. Dixon, supra*, went beyond the statement cited to hold that *once* the state permits the use of its buildings, it cannot

discriminate on an unconstitutional basis among those groups desiring to use the facilities.

If respondent is suggesting that the state may refuse altogether to support a primary system, we might agree that it is possible. We would argue that it is highly improbable, unwise, and perhaps even unconstitutional to withdraw that which has already become an integral part of the electoral process. Once, however, the state determines that it will hold primaries, it cannot withhold that facility on a discriminatory basis. If the state is to finance primaries, as the state and county have conceded that they do, then there can be no discrimination against persons using those facilities because of race, color, sex, religion or *wealth*.

Citing *Adderley v. Florida*, 385 U.S. 39 (1966) (rehearing denied, 385 U.S. 1020), respondent says the right of free speech does not permit the use of publicly-owned property not open to the public (Respondent's brief, page 38). This is a non-sequitur. If respondent means to imply that the ballot box is not open to the public, this confirms the feeling of millions of poor, Blacks, Chicanos, Asian-Americans, Indians, and women. As we have noted in our opening brief, "there is a correlation between income and political participation. The poor do not vote in large numbers." *New York Times* editorial, December 4, 1972, page 38.

The epitomy of the state's position was reached in and 1972 in Watts, probably the poorest community in Los Angeles County and the site of major riots in 1965. There, in the 55th Assembly District, incumbent assemblyman Leon Ralph faced no opposition in either the Democratic primary or in the general election. See the following editions of *Statement of Vote, State of California* compiled by the Secretary of State: "Direct Primary Election, June 2, 1970", page 29, "General

Election, November 3, 1970", page 28, "Consolidated Primary Election, June 6, 1972", page 38, and "General Election, November 7, 1972", page 22.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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EXHIBIT A

AFFIDAVIT OF LEWIS B. NCCAMMON, III

State of California)
) ss.
County of Los Angeles)

I, LEWIS B. McCAMMON, III, reside at 4309 Glenalbyn Drive, Los Angeles, California 90065, telephone number (213) 225-2332, and I state as follows:

I am the editor of "The Grantsmanship Center News", the monthly newsletter published by The Grantsmanship Center, a non-profit corporation ocated at 7815 South Vermont Avenue, Los Angeles. The Center offers training in proposal writing to other non-profit organizations.

On the afternoon of Thursday September 6, 1973, I worked for several hours in the Los Angeles office of the U.S. General Accounting Office on the 7th floor of the Federal Building, 300 N. Los Angeles Street, Los Angeles, gathering information on recent Office of Management and Budget directives establishing uniform grant application procedures for several federal agencies. While there, I noted that G.A.O. personnel were auditing the General Revenue Sharing expenditures of a number of local governments. I later asked Mr. Darryl Dutton of the G.A.O. staff what information his office carried on Revenue Sharing regulations and procedures. Mr. Dutton responded by introducing me to Mr. W.E. Sanchez, the person in charge of the audit then in progress.

Mr. Sanchez and I briefly discussed the sources of information available on Revenue Sharing and Mr. Sanchez asked if I had any specific questions on which he could go into greater detail. I stated that I had read a *Los Angeles Times* article that one of the Los Angeles County

Supervisors thought that it might be possible to use General Revenue Sharing funds to offset the costs to the County of the special statewide tax-initiative election called by the Governor for November 6, 1973, but that I had subsequently heard that this was not permissable. Mr. Sanchez said that there had been no decisions by the Office of Revenue Sharing in this particular area, but that the Los Angeles County Counsel had presented an opinion that such an expenditure would not be legal. He added, however, that a number of local governments had made capital expenditures from Revenue Sharing funds for voting machines and vote tabulating devices, though he stated that he could not tell me specifically which local governments had done so until a study based upon these audits was released publicly this December or early January.

I declare under penalty of perjury that the foregoing is a true, correct, and full account.

/s/ Lewis B. McCammon, III
Lewis B. McCammon, III

Subscribed and sworn to before
me on September 14, 1973,
/s/ Mary A. Quinn
Notary Public in and for the
State of California

(SEAL)